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No. 80-2100

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

QUENTIN ROGERS, RAY DELAIGLE, ROBERT L. WEBSTER, CHARLES H. KITCHENS, AND THOMAS M. LOVETT, AS MEMBERS OF THE BOARD OF COMMISSIONERS OF BURKE COUNTY, GEORGIA, AND A. HOLLAND GNANN, OTTO V. JOHNSON AND WALL T. THOMPSON, AS MEMBERS OF THE BOARD OF ELECTIONS OF BURKE COUNTY, GEORGIA,

Appellants,

versus

HERMAN LODGE, SHELLEY COLEMAN, LIZZIE M. SAMS, K. C. CHILDERS, REV. DAVID NELSON, TALMADGE D. LODGE, WOODROW HARVEY AND LEVI CRAWFORD,

Appellees.

Appeal from the United States Court of Appeals For the Fifth Circuit

BRIEF OF APPELLANTS

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QUESTIONS PRESENTED

(1) Whether the Court of Appeals erred in construing this Court's decision in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), as holding that proof of the voting dilution criteria of *Zimmer v. McKeithen*, 485 F.2d 1297 (C.A. 5th 1973), is still sufficient to establish an *inference* of purposeful discrimination in the retention of an at large voting system in effect since 1911, found by the district court below to have been "racially neutral" when adopted, and that the only effect of *Bolden* is to hold that the *Zimmer* criteria are no longer sufficient to establish a *presumption* of purposeful discrimination in the retention of the at large system?

(2) Whether the Court of Appeals also erred in holding that another aspect of *Bolden* is to require courts in voting dilution cases to attribute controlling significance to the question whether the political body in issue has been unresponsive to the needs of the black community, contrary to the principle that courts can not resolve purely political questions for which judicially manageable standards are lacking or pass upon the wisdom of legislation?

(3) Whether the Court of Appeals erred in holding that plaintiffs had carried the burden of proving a case of purposeful discrimination in the retention by Burke County of its at-large system of electing its five county commissioners, based upon evidence of the *Zimmer* criteria, not as strong as that held insufficient in *Bolden*, plus a finding of a "depressed socio-economic status" affecting blacks in Burke County? Embraced within the foregoing is the subsidiary question as to whether the action of the Court of Appeals is tantamount to invalidating an at-large plan without requiring a showing of

purposeful discrimination.

(4) Whether the Court of Appeals erred in holding that a case of unconstitutional vote dilution arising from an at-large system of election can be established under the Fifteenth Amendment?

(5) Whether the doctrine of unconstitutional dilution of voting rights arising from an at-large election system is applicable to county governing bodies?

(6) Whether, assuming that even after *Bolden*, the *Zimmer* criteria are still sufficient to give rise to an inference of purposeful discrimination as held by the Court of Appeals below, the finding in this case is nevertheless clearly erroneous on the evidence presented?

(7) Whether, even assuming that the existing at-large plan was unconstitutional, the district court below erred in ordering into effect a single member districting plan submitted by plaintiffs, deliberately gerrymandered to favor plaintiffs, in lieu of a plan submitted by defendants, without having first found and declared the defendants' plan to be invalid and insufficient in law, and without having afforded defendants an opportunity to submit their plan for preclearance under Section 5 of the Voting Rights Act, 42 USCA 1973c, contrary to the decisions in *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978), and *Berry v. Doles*, 438 U.S. 190 (1978).

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Appellants,

versus

HERMAN LODGE, SHELLEY COLEMAN, LIZZIE M. SAMS, K. C. CHILDERS, REV. DAVID NELSON, TALMADGE D. LODGE, WOODROW HARVEY AND LEVI CRAWFORD,

Appellees.

Appeal from the United States Court of Appeals For the Fifth Circuit

BRIEF OF APPELLANTS

OPINIONS BELOW

The opinion and judgment of the district court below are unreported, but are found in the Appellants' Jurisdictional Statement (p. 61a et seq.) and record (R. 743, 770).

The opinion of the Court of Appeals is reported as *Lodge v. Buxton*, 639 F.2d 1358 (C.A. 5th 1981), and is found in Appellants' Jurisdictional Statement (Appendix A., p. 1a).

JURISDICTION

Jurisdiction is based on 28 USCA 1254 (2), the Courts below having declared a statute of the State of Georgia (Ga. Laws 1911, p. 390) to be unconstitutional. The district court entered order on September 29, 1978 (R. 743) and findings of fact and conclusions of law were entered October 26, 1978 (R. 770). This Court granted a stay on November 3, 1978, *Rogers v. Lodge*, 439 U.S. 948 (1978) (R. 806). Notice of appeal was filed October 2, 1978 (R. 747). The Court of Appeals rendered its opinion and judgment on March 20, 1981 (Juris. Stat., p. 1a). Notice of Appeal to this Court was filed on March 25, 1981. This Court noted probable jurisdiction on October 5, 1981.

STATE STATUTE INVOLVED

The statute declared unconstitutional below is as follows:

> "That from and after the passage of this Act, there shall be created and established a Board of Commissioners of Roads and Revenues for the County of Burke in the State of Georgia, consisting of five persons who shall be elected by the qualified voters of said county at the general election to be held on the first Wednesday in October in the year 1912, and at each subsequent, alternate, general election, which election shall be held under the rules, regulations and laws governing the election of county officers in the county of Burke and said five persons shall possess the qualification of being resident freeholders of said County for at least three years prior to said election, shall be at least 28 years of age and eligible to election as a member of the General Assembly of the State of Georgia." (Ga. Laws 1911, pp. 390, 391).

STATEMENT OF THE CASE

This case, instituted on April 5, 1976, by eight black citizens of Burke County, Georgia, against the Commissioners of Burke County and the County Board of Elec-

tions,[1] attacked as an unconstitutional dilution of black voting rights, the at-large system of electing the five Commissioners of Burke County, which had been in effect by law since 1911 (Ga. Laws 1911, p. 390).[2]

According to the 1970 Census, Burke County had 18,255 persons,[3] of whom 10,988, or 60.19%, were black. There were 4,909 white persons of voting age (18 and older) and 5,617 black persons of voting age in the county. Stated differently, blacks constituted 53.36% of the total voting age population. (P.E. 58). In 1978, there were 6,373 persons registered to vote, of whom 2,433 or 38%, were black (D.E. 57, R. 776). (As of 1981, 39.4% of the registered voters are black).

Since 1911, the County has been governed by a board known as the "Board of Commissioners of Burke County." See Ga. Code §23-803. This board was created by the Act of 1911, and has remained in the same form to the present day. The Board consists of five (5) members, elected by all the voters of the County for four year terms. The County has never been divided into districts, either for the purpose of creating residency districts, or for the purpose of having the commissioners elected by the voters in the district. All five commissioners are elected at one

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[1] The action originally was brought against the probate judge rather than the Board of Elections. On learning from the defensive pleadings (R. 22) that the duty of conducting elections in Burke County had been transferred by statute from the Probate Judge to a "Board of Elections" (Ga. Laws 1975 Vol. II, p. 4506), the plaintiffs substituted the latter for the probate judge. Defendant Buxton, whose name appears in the style of the case as it appears in the Court below, was superseded on the Board by Mr. Rogers, who was substituted as a party defendant.

[2] In 1929, the Act was amended to provide for appointment of the 5 commissioners by the grand jury in 1932 (Ga. Laws 1929, p. 548), but before the Act was ever put into effect, it was amended in 1931 so as to revert back to election by the people (Ga. Laws 1931, p. 400).

[3] The chart in footnote 2 of the Court of Appeals' decision is in error, and was the subject of Appellees' Motion for Rehearing.

time, the last elections having been held in 1980.

The Georgia Election Code of 1964 provided that in order to be nominated or elected, candidates were required to receive a majority of the votes cast in the primary or election, and in the event no candidates received a majority in the first primary or election, a runoff was required to be held (Ga. Laws 1964, Ex. Sess., pp. 26, 174). The same act also provided that where two or more public officers having the same title are to be voted on, each candidate must qualify for a specific post or position. (Id., p. 89). These provisions were re-enacted in 1970 (Ga. Laws 1970 Vol. I, pp. 347, 380, 369) and now appear as Code Sections 34-1413 and 34-1015, respectively, and were approved by the Attorney General of the United States under Section 5 of the Voting Rights Act of 1965, 42 USCA 1973c. See *United States v. Georgia*, 436 U.S. 941 (1978).

Until 1970, the county Democratic Executive Committee conducted primary elections in the County (T2. 99; R. 932). From 1970, the Probate Court (formerly Ordinary) conducted the primaries also (T. 932). See Ga. Laws 1970 Vol. I, p. 347. In 1975, the conduct of all elections was transferred to a three-man Board of Elections (T. 932). See Ga. Laws 1975 Vol. II, p. 4506. Segregation at the polls was abolished in 1964 (T. 933).

There was no evidence that the 1911 county-wide law was enacted with discriminatory intent or purpose, and the district court below held that the enactment of the 1911 Act was "racially neutral when adopted" (R. 776, App. 71a) and "neutral in origin" (R. 791, App. 90a). There was also no evidence that blacks had any difficulty registering, voting or getting on the ballot in Burke County; indeed, the evidence was to the contrary (T. 93-6; 177, 322, 339, 356, 631, 710, 751, 765, 784, 804-6, 468, 851, 884-7, 932, 949-950; T2. 32, T2. 105, T2. 144).

The Court also found to this effect (R. 788, App. 87a).

The district court held that a case of unconstitutional vote dilution had been made out under the criteria of *Zimmer v. McKeithen*, 485 F.2d 1297 (C.A. 5th 1973), aff'd. sub nom *East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976), "but without approval of the constitutional views expressed by the Court of Appeals."

By way of relief, the district court ordered that a special election be held in the 1978 November General Election then shortly to be held at which five (5) new Commissioners would be elected from single-member districts according to a plan presented by plaintiffs. (The incumbents had been eleteed in 1976 for 4 year terms). On November 3, 1978, this Court granted a stay. *Rogers v. Lodge*, 439 U.S. 948 (1978).

On March 20, 1981, the Court of Appeals affirmed the judgment of the district court, with Judge Henderson dissenting. *Lodge v. Buxton*, 639 F.2d 1358 (C.A. 5th 1981).

To begin with, the majority opinion recognizes that the decision below must stand or fall on a finding of the "existence of a discriminatory purpose for the maintenance of such a system" (639 F.2d at 1363, f.n. 7). The majority then accuses this Court of misconstruing its 1978 decisions in *Nevett II* and *Bolden* (639 F.2d at 1368, f.n. 22). Then, reviewing the opinions in *Bolden*, supra, the majority concludes that *Bolden* has not changed the law, except to this limited extent:

> (1) The *Zimmer* criteria are rejected only "to the extent that the Court, in Bolden, *presumed* the existence of a discriminatory purpose from the proof of some of those factors" (639 F.2d at 1373). These factors may, however, be sufficient to give rise to an *inference* of discriminatory intent, as distinguished from a *presumption*. (639 F.2d at 1373-1381).

> (2) Regardless of how strong the other circumstantial evidence may be, however, a finding essential to showing a case of unconstitutional dilution is a showing of unresponsiveness by the governing bodies in question to the needs of black citizens. (639 F.2d at 1373).

The majority found additional circumstantial evidentiary support for its holding in the finding below of a depressed socio-economic status (639 F.2d at 1376).

Judge Henderson in dissent declares that *Mobile v. Bolden* has done more than reaffirm the necessity of a showing of discriminatory intent, for it has also abolished the "aggregate of factors approach of Zimmer v. McKeithen . . ."; that the same evidence held insufficient in *Mobile* was relied on by the district court below; and that the judgment should be vacated and remanded for reconsideration in the light of *Mobile*.

SUMMARY OF ARGUMENT

(1) The Court of Appeals erred in holding that the *Zimmer* factors are sufficient to establish a case of unconstitutional discrimination. The district court applied the *Zimmer* criteria, following *Bolden v. City of Mobile*, 571 F.2d 238 (C.A. 5th 1978). The Court of Appeals held that this Court's decision had not rejected the *Zimmer* factors, but only destroyed their efficacy as a *presumption*, while retaining them in full force as the basis for an *inference*. This construction is not supported by the majority opinions in *Bolden*, and represents the fourth time in three years that the Court of Appeals has refused to follow the decisions of this Court in voting cases. The *Zimmer* factors lack merit, as an evidentiary device, because of other valid reasons discussed herein.

(2) In holding that a controlling question now is

whether the governing authority has been responsive to black needs, the Court of Appeals not only misconstrued this Court's decision in *Bolden*, but also violates the rules prohibiting judicial consideration of political questions and judicial inquiry into the wisdom of acts of the law-making body.

(3) The Court's articulation of a new "Zimmer factor", i.e., a depressed socio-economic status, adds no support to the finding of dilution, for at best, this is simply more "impact" type evidence, and is but one aspect of an existing *Zimmer* factor, i.e., "whether the existence of past discrimination in general precludes the effective participation in the election system."

(4) The decision of the Court of Appeals is in conflict with another decision of the same court rendered one month previously, *McMillan v. Escambia County*, 638 F.2d 1239 (C.A. 5th 1981).

(5) This case is not distinguishable on the basis that it followed *Kirksey v. Supervisors*, 554 F.2d 139 (1977). That case does not survive *Bolden;* the *Kirksey* factor of an election system which "perpetuates an existent denial of access" is already one of the four *Zimmer* factors; and violates the rule that the scope of the remedy is governed by the nature of the violation.

(6) *Mobile v. Bolden* is not distinguishable on the ground that there an entire system of government was at issue. The *Mobile* provisions assigning executive responsibilities to each commissioner had not been precleared, and never went into effect. Even so, this Court's opinion addressed the inherent deficiencies of the *Zimmer* approach, and were not limited to an attack on a Commissioner form of government.

(7) Plaintiffs failed to prove a claim under §2 of the Voting Rights Act. Properly construed, that statute also

requires a showing of discriminatory purpose, even assuming that it applies to a voting dilution case.

(8) The dilution doctrine does not apply to county governing bodies. In state legislative apportionment cases, most districts are single-member, and when multi-member districts are involved, they obviously are suspect as being designed to discriminate. Also when only a small political subdivision is involved, there is an identity of interests which justifies at-large perspectives and allegiances.

(9) Even assuming that the *Zimmer* criteria are still valid, dilution was not established by the evidence in this case.

(10) There was no proof of discriminatory purpose in the enactment or retention of the at-large system. Plaintiffs conceded in the district court that there was no discriminatory purpose in enactment, and the district court so found. On appeal, plaintiffs attempted to change their position, but the references they relied on do not support their contention. With respect to retention, plaintiffs relied solely upon the *Zimmer* criteria, while the defendants produced direct evidence showing that the at-large voting plan had never been challenged before, and that it had not been retained for a discriminatory purpose.

(11) The Court below erred in rejecting defendants' plan and ordering plaintiffs' plan into effect simply on a finding that it was "superior". *Wise v. Lipscomb*, 437 U.S. 535 (1978).

(12) Because both parties were aware at the trial of the intentional discrimination requirement, the judgment below should be reversed and the case remanded with directions to the Court below to enter judgment for defendants.

ARGUMENT

(1) The Court Of Appeals Erred In Holding That The *Zimmer* Criteria Are Sufficient To Establish A Case Of Unconstitutional Dilution, And In Refusing, For The Fourth Time, To Follow The Decisions Of This Court

The decision of the district court below was rendered on September 29, 1978 (R. 743, App. 62a; Findings and Opinion, Oct. 26, 1978, R. 770, App. 64a), prior to this Court's decision in *Mobile v. Bolden*, 446 U.S. 55, 64 L.Ed.2d 47 (1980), and was based entirely on the four criteria of *Zimmer v. McKeithen*, 485 F.2d 1297 (C.A. 5th 1973), aff'd. sub nom. *East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976), "but without approval of the constitutional views expressed by the Court of Appeals."

The district court specifically found that the 1911 law under attack was "racially neutral when adopted" (R. 776, App. 71a) and "neutral in origin" (R. 791, App. 90a). The district court found also that plaintiffs had not been able to show a "denial of access to specific voting processes" (R. 788, App. 87a). There was no cross appeal from these two findings. The district court also took note of the then recent decision of the Court of Appeals in *Nevett v. Sides*, 571 F.2d 209, 221 (C.A. 5th 1978), holding that "A demonstration of intention is necessary under both fourteenth and fifteenth amendments as a requisite to a finding of unconstitutional vote dilution" (R. 773, App. 68a). However, the Court concluded that this "intent" requirement had not changed the law, and that an inference of intent could be raised by the *Zimmer* criteria (R. 773-4; Juris. Stat. 68a).

The Court of Appeals upheld this reasoning by declaring that the only change wrought by *Mobile v. Bolden*

was that the *Zimmer* criteria no longer were sufficient to raise a *presumption* of *purpose* or intent, but nevertheless survived as a sufficient basis for *inferring* intent or purpose (639 F.2d at 1373, 1375).

The Court did modify this "inference" test to the extent of holding that "An essential element of a prima facie case is proof of unresponsiveness by the public body in question to the group claiming injury" (639 F.2d at 1375).

The decisions of the courts below can not be squared with the majority opinions in *Mobile v. Bolden*. Clearly, this Court held in *Bolden* that the *Zimmer* criteria are no longer sufficient to establish a case of unconstitutional vote dilution. There is not the slightest statement in any of the opinions in *Bolden* to support the presumption -vs- inference distinction discerned by the majority opinion below. Nor is there any basis whatever in the majority opinions of this Court in *Bolden* for the holding of the Court of Appeals that a showing of unresponsiveness is now the controlling issue.

Regardless of other uncertainties arising from the six opinions in *Bolden*, it is not subject to dispute that five justices held that the *Zimmer* approach to proving purposeful discrimination is insufficient. To begin with, the plurality opinion alluded to the fact that *Zimmer* (1973) was decided before *Washington v. Davis*, 426 U.S. 229 (1976) "upon the misunderstanding that it is not necessary to show a discriminatory purpose in order to prove a violation of the Equal Protection Clause" (446 U.S. at 71), and concluded that the criteria were not sufficient proof (446 U.S. at 73).

Mr. Justice Stevens' concurring opinion agrees that the "Zimmer analysis should be rejected", but disapproves relying entirely on the question of subjective intent (446 U.S. at 90).

Stated differently, four justices concluded that discriminatory purpose was necessary to show dilution, and that the *Zimmer* criteria were insufficient because they were based on an outdated discriminatory "impact or effect" test developed in the 1973 decision in *Zimmer*. A fourth justice agreed that the *Zimmer* criteria are insufficient, but for a somewhat different reason.

The *Zimmer* case clearly was based on a "discriminatory impact" rationale, for there the Court of Appeals stated the test to be "that designedly *or otherwise*, an apportionment scheme, under the circumstances of a particular case, *would operate* to minimize or cancel out the voting strength of racial or political elements to the voting population . . ." 485 F.2d at 1304 (emphasis supplied). Not only does the language "or otherwise" and "operate" connote impact or effect as distinguished from purpose, but an analysis of the *Zimmer* criteria themselves points toward the same conclusion, for the criteria at best doubtfully give rise to an inference only as to how the voting arrangement *affects* a group, and says nothing of the intent or purpose with which it was adopted or retained. Indeed, only by assumption can it be said that the *effects* derive from the voting arrangement itself, for other factors may and often do cause the effects independently of the at-large election system. In other words, the *Zimmer* criteria are at best weak circumstantial evidence of *effect*, and demonstrate nothing at all as to *intent*.

The decision of the Court of Appeals below represents at least the *fourth time* in *three years* that the Court has refused to follow the decisions of this Court in voting dilution cases. Those four instances are:

1. *NEVETT II:* After *Washington v. Davis*, supra, the Court of Appeals had occasion to consider the question as to what effect the discriminatory intent or purpose

requirement had made on the *Zimmer* criteria. That question was addressed in *Nevett v. Sides*, supra, (Nevett II) decided the same day as *Bolden v. City of Mobile*, 571 F.2d 238 (C.A. 5th 1978), rev'd 446 U.S. 55 (1980).

The Court conceded that a showing of discriminatory purpose was now necessary. 571 F.2d at 219, and that language in *Zimmer* related to impact rather than to purpose (571 F.2d at 225).

Nevertheless, the Court held: "We hold today that a finding of dilution under Zimmer raises an inference of intentional discrimination, and therefore the essential element of intent was present in each of these cases." 571 F.2d at 225. Apparently, the Court of Appeals and the district courts in all prior dilution cases had been finding discriminatory intent without realizing it!

2. *BOLDEN ON REMAND:* Despite this Court's clear holding that *Zimmer* was insufficient, both the District Court and the Court of Appeals on remand, without further findings on intent, reinstated the very district plan previously ordered in the Board of Education case under a *Zimmer* finding, and which this Court had vacated. When Mr. Justice Powell expressed "serious concerns about the process of reasoning underlying the District Court's entry of a preliminary injunction", but nevertheless denied a stay because of peculiar circumstances of timing, *Moore v. Brown*, 448 U.S. 1335 (1980), the Court of Appeals on remand expedited the appeal and vacated the judgment in part.

3. *UVALDE:* Later, in *United States v. Uvalde School District*, 625 F.2d 547 (C.A. 5th 1980) cert. den. 68 L.Ed. 2d 858 (1981), the Court reiterated again its belief that its reasoning in *Bolden* and *Nevett* "survives the Supreme Court's decision intact" (625 F.2d at 553). This was the *third* time.

4. *LODGE V. BUXTON:* Now, for the *fourth* time in this case, the Court of Appeals has refused to follow the decisions of this Court. It has done so by resorting to a facile distinction based upon the difference between an inference and a presumption, a distinction not supported in the least by this Court's decision in *Bolden.*

Once again, the Court of Appeals, in a remarkable coincidence, finds that the district judge anticipated the very decision of this Court 2 years later in *Bolden.* See 639 F.2d at 1375-6. Thus, for the fourth time, the Court of Appeals has refused to respect the decisions of this Court.

Over 100 years ago, this Court declared "Undoubtedly, it is the duty of all inferior courts to yield a prompt obedience to the mandate of this Court . . ." *Ex Parte Howard,* 9 Wall 175, 182 (1870), and more recently, observed that its decisions interpreting the Constitution stand as the "supreme law of the land", binding on all. *Cooper v. Aaron,* 358 U.S. 1, 18 (1958).

The Court of Appeals continues to apply its "disparate impact" doctrine, for in a recent decision, the Court, in an opinion also authored by Judge Fay, held the Florida high school exit examination unconstitutional under equal protection because it produced a disparate impact on black students. *Debra P. v. Turlington,* 664 F.2d 397 (C.A. 5th 1981). See also, the critical comments on denial of rehearing. 654 F.2d 1079, 1084 (1981).

In *Kirksey v. City of Jackson,* 625 F.2d 21 (C.A. 5th 1980), the Court declared that the validity of the *Zimmer* criteria "is now very much in question in light of the recent Supreme Court opinion in City of Mobile . . .", while in *Corder v. Kirksey,* 639 F.2d 1191 (C.A. 5th 1981), the Court took a different view and held that the "substance" of its "approach", i.e., the *Zimmer* criteria, is still valid.

Analytically, however, there are other reasons why the *Zimmer* approach is wrong. Some of these reasons follow:

(a) *Vagueness-Result Oriented.* The very vagueness of the *Zimmer* approach casts a court adrift at sea without any rudder or compass other than its own political philosophy as a guide. It postulates a test so indefinite that if a legislature enacted it into a statute, this Court would promptly strike it down under the void-for-vagueness doctrine. In a comment on the *Zimmer* case written shortly after its release, one commentator pointed out the inherent vagueness of the four criteria, and predicted that they would tend to become a *per se* rule of illegality. See 87 Harv. L.R. 1851, 1859 (1974). This has proven to be a correct assessment.

One has only to compare the decisions in *David v. Garrison*, 553 F.2d 923 (C.A. 5th 1977), and *McGill v. Gadsden Co. Commission*, 535 F.2d 277 (C.A. 5th 1976), rejecting claims of dilution, with such cases as *United States v. Board of Supervisors of Forrest County*, 571 F.2d 951 (C.A. 5th 1978), and *Kirksey v. Board of Supervisors of Hinds County*, 554 F.2d 139 (C.A. 5th 1977), finding dilution, to appreciate how subjectively amenable to the individual predilections of judges the *Zimmer* criteria are.

(b) *Zimmer Mandates Racial Quotas In Voting.* The Court of Appeals has not only applied *Zimmer* to require single-member districts, but has added thereto the requirement that the districts be deliberately gerrymandered so as to insure "safe" black districts and proportionate racial representation. In *Kirksey*, 554 F.2d at 151, the Court held that lower courts were required to do this. As observed in the plurality opinion in *Bolden* (446 U.S. at 75), a requirement of proportional representation can not be confined to black voters only. It necessarily must apply all over the United States, to Hispanics in Texas, Irish in Massachusetts, and Poles and Germans in Wis-

consin. Nothing could be more devisive than the idea that people, because of their race or nationality, are entitled to special privileges. Such a principle *requires* legislatures to consider race, Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L.J. 1207, 1260 (1970), and not only exacerbates rather than reduces racial tensions, *University of California Regents v. Bakke*, 438 U.S. 265, 298 (1978), but it is demeaning and insulting to the disadvantaged group by stigmatizing them as being inferior, thereby requiring special treatment. This results in a "quota" approach to voting cases no different from the quotas utilized in some employment discrimination cases.

(c) *The Zimmer Inference Is Illogical.* An obvious fallacy of the *Zimmer* criteria is that the intended inference by no means logically follows from the subsidiary evidentiary findings. The four *Zimmer* findings fail altogether to raise an inference of *intentional* discrimination, and constitute the weakest sort of speculative evidence on the question of "impact". This is particularly true with respect to the *Zimmer* factor relating to the "existence of past discrimination", and the new *Zimmer* factor articulated by the courts below here, i.e., depressed socio-economic status. The fact that some people may unfortunately have been required to attend segregated schools or public accommodations in years gone by does not support the conclusion that they are now denied equal access to participate in the election system. This particular *Zimmer* factor is also peculiarly subject to abuse for it permits a plaintiff to parade before the Court every minor detail of prior discrimination in the history of the area in the expected hope that the revulsion to this unhappy past will somehow obscure analysis and evoke a favorable response based on sympathy rather than reason. It amounts to a judicial dispensation of a type of reparation

for past wrongs, no different in principle than if the Court were to say that because minority children were required to attend segregated schools, they should now be permitted to vote twice in every election.

The findings below are not nearly as strong as those in *Mobile* [See 423 F. Supp. 384 (D.C. Ala. 1976)] which this Court held insufficient. 446 U.S. 55 (1980). Both in *Bolden* and here, plaintiffs were found to have succeeded in establishing the same three *Zimmer* criteria. Here, unlike *Bolden*, there is no evidence whatever that efforts to change the system were defeated by resort to racial arguments. This case was the first effort in Burke County to change the at-large system. The sole means of proving purposeful discrimination in this case was by use of the *Zimmer* criteria, and the added factor of socio-economic deprivation which, as previously shown, is really part of the *Zimmer* factor relating to the effects of past discrimination. There was also evidence in *Bolden* supporting this latter factor. See 423 F. Supp. at 391. In *Bolden*, there was also findings of bloc voting; that the at-large system perpetuated the effects of past discrimination; that blacks had never been elected; and that there had been recent cross burnings and a mock lynching (p. 392).

(2) In According Controlling Significance To Whether Governing Authorities Are Responsive To Black Needs, The Court Below Has Sanctioned Judicial Resolution Of Essentially Political Questions

One of the original *Zimmer* criteria was stated to be "the unresponsiveness of legislators to their particularized interests." 485 F.2d at 1305. As stated, this was one of the four primary criteria. The decision of the Court below now elevates it to controlling significance, for the Court declares that: "Unresponsiveness is a necessary element to a plaintiff's maintenance of an action such as this." (639 F.2d at 1374).

To begin with, nothing in this Court's decision in *Bolden* supports this part of the Court of Appeals' decision. To the contrary, the plurality opinion observed that black citizens discriminated against in jobs and other benefits had their remedies by suing directly for the benefit involved, 466 U.S. at 73, and that "past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." (466 U.S. at 74).

In this case, plaintiffs launched an exhaustive inquiry into every resolution, vote, program, appropriation, road paving and response made by the Burke County Commissioners during the last 40 years. Some 289 exhibits were introduced by plaintiffs, most of which addressed this issue. The district court's findings devoted some 5 pages to it, (R. 780-784 App. 77a-82a), ranging from committee appointments and road pavings to rejection of federal aid programs benefitting black citizens. While there well may be some language in *White v. Regester*, 412 U.S. 755, 769 (1973) supporting the responsiveness issue, neither this Court nor any lower Court has yet confronted the issue whether judicial inquiry into such a question is precluded by the political question doctrine. If there is anything left of this doctrine, it is difficult to see how any question could be more political in nature, as involving "policy determinations for which judicially manageable standards are lacking." *Baker v. Carr*, 369 U.S. 186, 226 (1962); *Coleman v. Miller*, 307 U.S. 433, 454 (1939). Not only must a court resolve the controversial and partisan question as to what are the legitimate expectations of various segments of the population, but must also adjudicate such questions as priorities, validity of compromises, and whether failure to grant a particular deserved benefit was nevertheless justified for other reasons. Whether a legislative body is responsive or unresponsive to legit-

imate needs of the people is the very question which under our system of government is reserved to the voters. A federal court composed of judges elected by no one and enjoying life tenure is hardly such a broadly-based democratic institution as should be entrusted with such choices.

Even granted that the political question doctrine is "primarily a function of the separation of powers" and hence has stronger application when considered with respect to acts of Congress, *Baker v. Carr*, 369 U.S. 186, 210 (1962), it does not follow that the courts can decide whether legislative action is "wise or desirable", *James v. Strange*, 407 U.S. 128, 133 (1972), for courts do "not strike down laws because they may be unwise, improvident or out of harmony with a particular school of thought," and "We should not forget that legislatures are ultimately guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Maher v. Roe*, 432 U.S. 464, 479 (1977). Whatever the ultimate validity of county-wide voting, its constitutionality should not be made to depend on a court's political opinions.

(3) The Court's Finding Of A Depressed Socio-Economic Status Adds No Support To The Finding Of Dilution

The Court of Appeals gives as one additional reason for its affirmance, the fact that the district court also relied on another factor, a depressed socio-economic status, referring to this as "a similar factor" (639 F.2d at 1376).

To begin with, this Court has never held that just because an identifiable segment of the population is disadvantaged economically or socially as compared to another group, this entitles the former to some special dispensation in the area of voting rights. Of course, a citizen can not be deprived of the right to vote because he owns no property. *Cipriano v. Houma*, 395 U.S. 701 (1969); *Hill v. Stone*, 421 U.S. 289 (1975). The question here, of course,

is not whether poverty or social deprivation can be penalized, but whether the state is required to discriminate in favor of its victims because of the condition.

With respect to the matter at issue here, blacks are not the minority. They constitute 60.19% of the total population according to the 1970 census, and 53.39% of the voting age population. In Burke County, they have only to register and vote, and they could control all elections. The undisputed evidence here is that blacks have suffered no difficulty in registering, voting or running for office. Every witness presented by plaintiffs, without exception, testified to this effect.

Moreover, a depressed socio-economic status is at best simply more of the "impact" or "effect" type evidence which the Court of Appeals seems to be so preoccupied with. Even here, it is a long jump to infer discrimination in political access from the fact that one group has less money or social standing than another.

Lastly, the fact of a depressed socio-economic status seems to be but one part of the *Zimmer* primary factor which deals with whether "the existence of past discrimination in general precludes the effective participation in the election system." *Zimmer*, supra, 485 F.2d at 1305. Consequently, it is more properly treated as one constituent element of this primary factor, and should not be elevated to separate status in order artificially to bolster an otherwise deficient evidentiary showing. This very approach has characterized the application of the *Zimmer* criteria by the Court of Appeals. In this respect, it should be recalled that two of the criteria deal with "access to the process of slating candidates" and whether "the existence of past discrimination in general precludes the effective participation in the election system" (485 F.2d at 1305). As utilized by the Court of Appeals, the latter factor has tended to gobble up the former, and a finding

on the discrimination factor is also taken as establishing the slating factor. In this case as in *Bolden*, the Court of Appeals was confronted with the undisputed fact that blacks do have equal access to the slating of candidates in the sense that this term was utilized in *White v. Regester*, 412 U.S. 755, 766-7.[4] Confronted also with the fact that no such evidence existed in either this case or the *Mobile* case, the Court of Appeals nevertheless resolved the slating factor in favor of plaintiffs by referring to past discrimination and its alleged inhibiting effects on present participation. *Bolden*, supra, 571 F.2d at p. 243; *Lodge v. Buxton*, supra, 639 F.2d at 1379. In the plurality opinion in *Bolden*, this inconsistency of the Court of Appeals was noted.[5]

Depressed socio-economic status, even when added to the other *Zimmer* factors, does not make out a case of unconstitutional dilution.

(4) The Decision Of The Court Of Appeals Is In Conflict With Another Decision Of The Same Court

Not only does the decision below fail to follow the controlling decisions of this Court, it is in direct conflict with a decision of another panel of the same court decided one month earlier. In *McMillan v. Escambia County*, 638 F.2d 1239 (C.A. 5th 1981), another panel of the Fifth Circuit, reached exactly the opposite result, declaring that "*Zimmer v. McKeithen* has been invalidated by *Bolden*," 638

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[4] Referring to the district court findings, this Court in White v. Regester alluded to the fact that only 2 Negroes had ever been "slated by the Dallas Committee for Responsible Government (DCRG), a white dominated organization that is in effective control of Democratic Party slating in Dallas County." (Id.).

[5] "On the basis of these findings, the court concluded that the political processes in Mobile were not equally open to Negroes, despite its seemingly inconsistent findings that there were no inhibitions against Negroes becoming candidates, and that in fact Negroes had registered and voted without hindrance." (446 U.S. at 71).

F.2d at 1247, f.n. 16, and that the *Zimmer* factors of whether whites campaign for black votes and whether people in elective positions are responsive to minority needs, are no longer relevant. (638 F.2d at 1248.) The *McMillan* case, it is submitted, represents the proper approach to dilution cases, for it focuses upon whether (1) There was evidence of discriminatory intent in enactment, and (2) Whether subsequent thereto efforts to change the law were defeated by racially inspired arguments.

Also, in *United States v. Uvalde School Dist.*, 625 F.2d 547 (C.A. 5th 1980), cert. den. 68 L.Ed.2d 858 (1981), one panel of the Court of Appeals held that the 15th amendment reaches a dilution claim, whereas another panel held to the contrary in the *McMillan* case, supra.

(5) The Decision Below Is Not Sustainable Under *Kirksey*, 554 F.2d 139

The United States filed an *Amicus Curiae* brief in the Court of Appeals attempting to distinguish this case on the reasoning that the district court below followed *Kirksey v. Supervisors*, 554 F.2d 139 (C.A. 5th 1977), and that *Kirksey* was not discredited by *Mobile v. Bolden*, 446 U.S. 55 (1980). This argument seizes upon language in *Kirksey* condemning an election plan which "perpetuates an existent denial of access to the political process" (554 F.2d at 142), and pointing to the findings below of past discrimination, the government urges that as in the school segregation cases, once a *de jure* violation is shown, a continuing duty arises to eradicate the effects thereof, and where discriminatory impact is seen to flow from a practice, that practice is invalid as perpetuating the effects of prior discrimination without having to show a discriminatory purpose. In other words, it is contended that this is a *remedy* case and not a *violation* case. This

argument is not valid for several reasons.

First, it is said that *Bolden* did not reject *Kirksey*. *Kirksey* was necessarily disapproved because in *Bolden*, the district court had made the same findings of massive discrimination in the past which the Court found operated to effectively deny political participation in the present,[6] and the Court of Appeals in its opinion in *Bolden* expressly adopted the *Kirksey* rationale, referring to the fact that it must be shown that "enough of the incidents of the past have been removed, and the effects of past denial of access dissipated . . . (citing *Kirksey*) . . ." (571 F.2d at 245), and condemning "an innocently formulated plan that perpetuates past intentional "discrimination . . ." citing *Kirksey* again (p. 245-6). Consequently, the Court of Appeals in *Bolden* specifically invoked the very *Kirksey* principle asserted here, and it did not survive judgment in this Court.

Second, the Government's contention would reduce the 4 *Zimmer* factors to only one. Under *Zimmer*, one of the four primary factors was stated to be, whether the "existence of past discrimination in general precludes the effective participation in the election system" (*Zimmer*, 485 F.2d at 1305).

This *Zimmer* factor is precisely the same holding of *Kirksey* which the Government erroneously says is a "new" approach. It is already one of the 4 *Zimmer* factors. The Government's position would now elevate this factor, originally one of the four in *Zimmer*, to the *only* factor that need be considered.

Certainly, if this factor plus 3 others were held insufficient in *Bolden*, it alone can not be sufficient now.

Third, the Government's argument is not supportable

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[6] See *Bolden v. City of Mobile*, 423 F. Supp. 384, at 387, 398, 401.

by the school case analogy, where current segregation is presumed to be the result of prior discrimination in a system found to have been guilty of *de jure* segregation. This analogy does not stand up. The Georgia grandfather clause expired in 1915 (Ga. Laws 1908, pp. 27, 29; Art. II, Sec. I, Par. II, Const. of 1877). The white primary was abolished in 1945. Once these laws and practices were abolished, they were at an end. There was no continuing illegal system in the same sense as a school system with segregated classes or faculty, which the state was under a continuing affirmative duty to eradicate. Otherwise, courts would be empowered to declare void laws which are not invalid themselves but simply because of past "societal discrimination." Such a proposition would invalidate numerous laws in all walks of life based simply on impact. *Goodman*, 60 Cal. L.R. 275, 300 (1972). Arguably, all "impact" can be traced to past discrimination in ages gone by. Note, 25 Emory L.J. 737. This Court flatly rejected this "polluted stream" or "original sin" doctrine in *Bolden* (446 U.S. at 74), and Mr. Justice Powell's opinion in *University of California Regents v. Bakke*, 438 U.S. 265, 307, 310 (1978), points out that the Constitution does not justify reverse discrimination on the basis of such an amorphous concept as "societal discrimination." Such a proposition would support reverse discrimination for all time to come.

Fourth, the Government's position violates the principle that the nature of the violation determines the scope of the remedy. The constitutional violation asserted in this case was not school segregation, employment discrimination, or some other form of segregation, but *at-large voting*, which was alleged to violate the Constitution, and it was this which the suit sought to enjoin.

Constitutional violations in other areas do not authorize relief related to voting. As stated in *Swann v. Charlotte-*

Mecklenburg Board of Education, 402 U.S. 1, 16: ". . . it is important to remember that judicial powers may be exercised only on the basis of a constitutional violation . . . and * * * As with any equity case, *the nature of the violation* determines the *scope of the remedy*." In *Milliken II* [(*Milliken v. Bradley*, 433 U.S. 267, 280, 282 (1977),] the Court held that: "The remedy must therefore be related to the condition alleged to offend the Constitution," and, "Federal court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation."

These same principles were followed in *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977) where the Court rejected findings below that tended to view the present structure of the Dayton School System as a "sort of fruit of the poisonous tree." (433 U.S. at 417). The Court reiterated that the remedy must be "tailored to fit the nature and extent of the constitutional violation." (433 U.S. at 420). Otherwise, a constitutional violation once found in one area would support remedial action in a whole gamut of unrelated activities.

The plurality and concurring opinions in *Bolden* necessarily rejected this argument. Otherwise, the judgment below, which followed the *Kirksey* rationale, would not have been vacated.

Fifth, *Kirksey* is itself distinguishable, and affords no precedent for an at-large case such as is presented here. *Kirksey* was not an at-large dilution case, but a racial gerrymander case involving a districting scheme which fragmented the black vote concentrated in the central city area by pie-shaped districts, "a stark pattern, unexplainable on grounds other than race" (554 F.2d at 148). *Kirksey* also involved an attack on a plan recently enacted in the context of an existing reapportionment case in a jurisdiction where federal voting registrars had

been appointed only a few years before (Id., p. 152). Here, the law had been in effect since 1911, and Burke County had no prior history of discriminatory voting practices.

(6) *Mobile v. Bolden* Is Not Distinguishable On The Ground That An Entire System Of Government Was At Issue In That Case

Plaintiffs argue that in *Mobile*, an entire system of government was under attack in that under Mobile's commissioner form of government, each commissioner had certain executive responsibilities, whereas here, it is said only at-large voting was involved.

This distinction is not valid for 2 reasons:

First, an entire governmental structure was not in issue in *Mobile*, because the Commissioner-role amendment was not adopted until 1965, after the Voting Rights Act. The 1965 Amendment had never been precleared under §5 (42 USCA 1973c) [7] and hence it never went into effect and was not a valid law such as could create a "governmental structure."

Second, the reasoning of this Court's opinions negate any such construction.

The plurality opinion deals separately with the two *Zimmer* criteria mainly relied on both in *Mobile* and this case, i.e., history of past discrimination, and unresponsiveness, aggravated by bloc voting and lack of black success at the polls.

As to this failure to elect blacks, the Court declared that the findings made clear that Negroes register and vote in Mobile without hindrance, and that there are no

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[7] This failure to obtain preclearance was recognized at every level. See 423 F. Supp. 384 at 386, f.n. 2; 571 F.2d 238, at pp. 241, 246, and 446 U.S. at 59, f.n. 6.

official obstacles in the way of Negroes who wish to become candidates for election . . ."; and noted, as here (T. 886; T2. 107; T2. 146), that the only slating organization in the City is comprised of blacks, and concluded: "It may be that Negro candidates have been defeated, but that fact alone does not work a constitutional deprivation". (446 U.S. at 73).

With respect to responsiveness, the Court declared that assuming that blacks were discriminated against with respect to employment and services, "those discriminated against may be entitled to relief under the Constitution albeit of a sort quite different from that sought in the present case" (446 U.S. at 73).

With respect to the history of official discrimination in Alabama, the Court remarked that,

> "But past discrimination can not, in the manner of original sin, condemn governmental action that is not itself unlawful." (446 U.S. at 74).

Mr. Justice Stevens' concurring opinion, which makes up the majority holding, treated the issues in the context solely of at-large voting. He alluded to the fact that Mobile's basic election system "is the same as that followed by literally thousands of municipalities and other governmental units throughout the nation" (446 U.S. at 92), an obvious reference to footnote 7 of the plurality opinion which pointed out that most municipalities of over 25,000 people utilize the at-large election system (446 U.S. at 60).

The plurality and concurring opinion rejected outright the *Zimmer* approach, without regard to the commission-type government question.

(7) No Claim Under Section 2 Of The Voting Rights Act Was Shown, For It Also Requires A Showing Of Discriminatory Purpose

Both plaintiffs and the United States relied in the Court

of Appeals upon Section 2 of the Voting Rights Act of 1965, 42 USCA 1973, which declares: "No voting qualification or prerequisite to voting, or standard, practice, or procedure can be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color, [or in contravention of the guarantees set forth in section 1973b(f)(2) of this title]." (matter in brackets added by 1975 amendment).

Plaintiffs say that only a plurality in the *Mobile* case took the position that §2 is not satisfied by discriminatory impact evidence. While Mr. Justice Stevens' concurring opinion did not mention the statutory claim rejected by the plurality, it is obvious that he is in agreement therewith, for otherwise, he and the four dissenting members of the Court would have constituted a majority of justices, thereby affirming the decision of the Court of Appeals.

Despite dicta in *Toney v. White*, 476 F.2d 203, 207 (1973), the Court of Appeals in *Nevett II* declared that: ". . . this court knows of no successful dilution claim expressly founded on 42 USCA 1973" (571 F.2d at 242, f.n. 3).

Both in *Uvalde*, 625 F.2d 547 (1980), cert. den. 68 L.Ed. 2d 858 (1981), and here, (639 F.2d at 1372) the panels held that both the 15th Amendment and §2 would reach a case of voting dilution, but that intentional and purposeful discrimination must be shown, while *McMillan v. Escambia County*, 638 F.2d 1239, 1243 (C.A. 5th 1981), held that neither applied to dilution cases.

In *Bolden*, the plurality opinion held that Section 2 "was intended to have an effect no different from that of the Fifteenth Amendment" and that it "adds nothing to the appellee's Fifteenth Amendment claim" (446 U.S. at 61), and that under the Fifteenth Amendment (a) Discriminatory intent or purpose must be shown (446 U.S.

at 62) and (b) That the Fifteenth Amendment reaches only a denial of the right to vote and does not affect at-large voting at all (446 U.S. at 65).

Mr. Justice Blackmun did not address the issue. Mr. Justice Stevens felt that the Fifteenth Amendment does apply (446 U.S. at 84), and Justices Marshall and Brennan seem to agree.

Regardless of whether §2 reaches a dilution claim, it is certain that a majority did not consider that it would suffice to establish a claim under the proof adduced in this case, proof which clearly was not as strong as that presented in *Bolden*. See 423 F. Supp. 384.

In any event, all cases at least require a showing of intentional discrimination, and since plaintiffs' 14th Amendment argument fails on that point, so also must its 15th Amendment and §2 argument fail.

The Government argues that Congress did not intend any difference in standards between §2 (42 USCA 1973) and §5 (42 USCA 1973c), and hence, discriminatory impact should be sufficient under §2 just as it has been held to be under §5.

The Court of Appeals has already answered this question to the contrary in *Uvalde*, just as a plurality and in effect a majority of this Court did in *Bolden*. In Section 5, Congress specifically used the terms "purpose *and effect*", 42 USCA 1973c, (as it did in §4, 42 USCA 1973b), whereas it omitted reference to any "effect" or "impact" language in §2, but used instead the same grammatical structure as the Fifteenth and Fourteenth Amendments.

Secondly, Congress was dealing with a different thing in §2 altogether. There, Congress was stating a proposition applicable to all parts of the country, while in §5, it was dealing with *changes* in particular areas which because of past conduct raised at least a suspicion of ulterior

motives, and where it was obviously desired to impose a stricter standard. The Court of Appeals recognized in *Uvalde* that one "cannot assume that each of the sections is designed to reach the same objective or is necessarily to be read in the same manner". 625 F.2d at 550.

It was also urged by plaintiffs below that §2 does not use the terms "intent" or "purpose". Neither does the 14th Amendment, but it, like §2, uses the terms "deny or abridge" and they have been construed as requiring a showing of "intent" or "purpose" under the 14th Amendment. Lastly, it is submitted that a discriminatory intent requirement is to be preferred. The Second Circuit has held recently that discriminatory intent is required under Title 6, thereby superseding *Lau v. Nichols*, 414 U.S. 563 (1974). *Lora v. Bd. of Educators*, 623 F.2d 248 (C.A. 2nd 1980).

(8) The Dilution Doctrine Does Not Apply To County Governing Bodies

In *Wise v. Lipscomb*, 437 U.S. 535, 550 (1978), four justices expressed doubt that the dilution doctrine applies to the governing bodies of political subdivisions.

This issue was raised and asserted by defendants in this case (T. 252).

There are clear differences. To begin with, in state legislative seat cases, most of the districts are almost always single member districts, so when a multi-member district is included, the question naturally arises as to why should some districts be different? The very fact of their difference makes them suspect. *Second*, the very purpose of state legislative apportionment is to accord representation to the differing elements of a large geographical area. This is not so when only a county is involved, particularly one no larger geographically or population-wise than Burke County. There are valid reasons why a county-

wide allegiance is desirable in a small elected public body having a greater identity of problems than in a state-wide governing body. See Note, 87 Harv. L.R. 1851, 1857 (1974).

(9) Even Assuming The Validity Of The *Zimmer* Criteria, Dilution Was Not Established In This Case

Even under the *Zimmer* criteria, the evidence does not support a finding of dilution.

(a) *Access To The Slating Process*

The Court below confused two of the *Zimmer* factors by holding, in effect, that satisfaction of the factor relating to a showing of continuing effects of prior discrimination also establishes lack of access to slating (Juris. Stat., p. 85a). "Slating", as used in the *Zimmer* formula, means just what it says—the process of selecting candidates and getting them on the ballot. See *White v. Regester*, 412 U.S. 755, 766 (1973), and *McGill v. Gadsden County Commission*, 535 F.2d 277, 280 (C.A. 5th 1976). The slating factor is distinct from the separate *Zimmer* factor of the continuing effects of past discrimination. Otherwise, there would be only 3 and not 4 *Zimmer* factors.

As in *Mobile*, there also are no formal slating arrangements in Burke County, no political organization through whom candidacies are cleared, and all the candidate has to do is to sign up with the party and pay a small fee (Lewis, T2. 145-6; Marchman, T2. 246; Buxton, T. 824; Thompson, T. 844-8; Webster, T2. 27; Harden, T2. 102, 106; Lewis, T2. 145-6). The Committee itself does not solicit candidates (T2. 110).

In fact, it appears that blacks are better organized politically than whites, for while there are no white political organizations which endorse candidates (Lewis T2. 146-7), there are at least two black organizations which conduct

meetings, endorse candidates, and one of them publishes a "ticket" for elections (Lewis T2. 146-8; Marchman, T2. 250; Lodge T. 716-721, 751-3, 761-1; Thompson, T. 886; Harden, T. 107-108).

Essentially, the sole basis for the court's finding on the slating issue was that blacks had been excluded from the local Democratic Executive Committee (T. 788, Juris. Stat. 87a). The Court of Appeals approved this finding. 639 F.2d at 1378. There was no evidence at all supporting the finding that blacks had been excluded from the Democratic Executive Committee. The evidence showed that these positions were not appointed, but were elected by the people in the Democratic primary; that widespread announcements of the election therefor were given in the newspapers and radio, and that little interest was exhibited by whites or blacks. (T2. 99, 109-110, 148-150; T. 542, 894-5). It is hardly correct to say that blacks have been "excluded" when the positions are elected and blacks simply do not offer. It is rather strange that after having held that the failure of blacks to elect county commissioners proportionate to their numbers did not show discrimination, the District Court and the Court of Appeals here both seem to conclude just the contrary with respect to the local Democratic Executive Committee which, it happens, is elected on the single-member district basis that the plaintiffs are asking for in this case (T. 891)! The district court's finding with respect to the political access factor is clear error, for under *White v. Regester*, 412 U.S. 755, 765-6 (1973), the fact that a minority has not elected its candidates in proportion to its voting potential does not show discrimination. The Court of Appeals in this case paid lip service to this proposition (639 F.2d at 1362), but completely disregarded it in failing to set aside the district court's finding on the political access question.

The Court below also found that a freeholder requirement for registrars precluded black participation (T. 779, Juris. Stat., p. 75a). However, this law (Ga. Code §34-605) had been repealed prior to the filing of this suit. This finding therefore was error.

The Court also found, and the Court of Appeals reiterated it (639 F.2d at 1377), that the County only established new registration sites following "friendly persuasion" by the Court at a pretrial conference (T. 783, Juris. Stat., p. 81a).

This is incorrect. These sites were established on February 10, 1976 (D.E. 4) before this case was filed on April 5, 1976, and many months before the first pretrial conference was held on March 4, 1977.

(b) *Tenous State Policy Underlying The At-Large System*

This factor (see *Zimmer*, 485 F.2d at 1305) must be resolved in favor of defendants. The district court merely declared that this factor was "neutral" (R. 790; Juris. Stat. 90a). The evidence, however, shows that there was a long standing policy favoring county-wide voting in Burke County for the system had been in effect since 1911 (See Ga. Laws 1911, p. 390). Also, defendants called attention to laws in ten adjoining counties which provided for the election of local governing bodies on an at-large basis. See Defendants' Trial Brief (R. 689). As pointed out in *Mobile*, supra, at-large elections in political subdivisions have long been considered a desirable method. 446 U.S. at 70, f.n. 15. Most municipalities of over 25,000 people elect on an at-large basis (Id. at 60, f.n. 7), and it is a method followed by "literally thousands of municipalities and other governmental units." Id. at 92 (Justice Stevens, concurring). Of the 50 largest school boards in the United States, 30 use at-large elections. *Black Voters*

v. McDonough, 565 F.2d 1, 2 (C.A. 1st 1977). Here, valid reasons supporting use of the at-large system were testified to in full. (Hardin, T2. 101-103, 113; Thompson, T. 882, 910-911; Lewis, T2. 141-144).

(c) *Existence Of Past Discrimination Which Precludes Effective Participation*

The Court below resolved this factor in favor of plaintiffs (R. 775; Juris. Stat. 71a).

It is certainly no secret that Georgia laws previously mandated racial segregation in such areas as education and public transportation, just as litigation conducted during the last few years had demonstrated that in most other areas of the United States, racial discrimination has been practiced covertly.

This being a voting case, however, the important question is to what extent this precludes effective participation today. As stated in *McGill v. Gadsden County Commission*, 535 F.2d 277, 281 (C.A. 5th 1976), "The key question, however, is whether 'the existence of past discrimination in general precludes the effective participation [of blacks] in the election system' today. *Zimmer*, 485 F.2d at 1305."

The undisputed evidence here was that blacks had no difficulty in registering, voting or running for office in Burke County. All of plaintiffs' black witnesses testified to this fact: Rev. John Ellis (T. 93-6), D.E. 28; Mrs. Dorothy Lattimore (T. 151); Woodrow Harvey (T. 312, 322-3, 326), D.E. 26; Gloria Sullivan (T. 339); Mary Frances Laurant (T. 356); Ruth Jones (T. 631); Herman Lodge (T. 712-15), D.E. 25.

The Court below specifically found that plaintiffs were "unable to show a denial of access to specific voting processes, similar to the obviously egregious denials in Kirksey . . ." (T. 788, Juris. Stat., p. 87a).

Registration cards for black citizens were produced as far back as 1946 (D.E. 53, 36, 37, 40-46).

There was no evidence that voting registrars had ever been appointed for Burke County, cf. *Kirksey*, 554 F.2d at 152, or that any litigation had ever been brought complaining of a denial of the right to register or vote.

All of defendants' witnesses testified that blacks had never experienced any difficulty in registering or in voting. (May, T. 765; Chappell, T. 784-7; Dinkins, T. 804-6; Bunn, T. 846; Walker, T. 851-3; Thompson, T. 884, 887; Herrington, T. 932-3; McNair, T. 949-50; Webster, T2. 32; Harden T2. 105; Lewis, T2. 144).

It also appears without dispute that white candidates actively solicit black votes (Dinkins, T. 805; Buxton, T. 823; Thompson, T. 881; Webster, T2. 30; Lewis, T. 139-140).

Plaintiffs attempted to show that one black witness, Rev. John Ellis, experienced difficulty in registering in 1960 because he had to go to the Courthouse 3 times (T. 71). However, the undisputed testimony was that at this time, registration was conducted only on certain days, and all applicants were required to make an application one day, and return on another day to complete registration before the registrars (Chappell, T. 785; Dinkins, T. 802). More significantly, it appears that Rev. Ellis was permitted to register although he did not move to Georgia until 1960 (T. 69) and was registered on September 21, 1960, before he had completed the one year residency required under the 1945 Constitution (Ga. Laws 1945, pp. 8, 15) in effect at that time (D.E. 28), hardly a case of discrimination.

Plaintiffs point to the fact that until the Voting Rights Act, Georgia enforced a literacy test. However, there was no evidence that it had ever been enforced in a discrimi-

natory fashion, and it should be recalled here that this test was not unconstitutional. *Lassiter v. Northampton Board of Elections*, 360 U.S. 45 (1959).

Even so, the undisputed evidence is that in Burke County, the test was fairly administered. Mrs. Winnie Chappell testified that she worked in the Tax Commissioner's office from 1952 to 1974; that she administered the test equally to all (T. 782-4) and that she doesn't recall any applicant being refused registration because of inability to pass the test (T. 784). Mrs. John T. Dinkins, who was Tax Commissioner from 1957 to 1971, and who worked in the office with her husband before then (T. 801), testified that she was never aware of any black persons being refused registration on the basis of the literacy test (T. 802). None of this evidence was contradicted.

In 1975, black citizens, including plaintiff Lodge, requested that the Commissioners establish additional registration sites (P.E. 102). This request was granted, and the Commissioners established three new registration sites (D.E. 4; T. 733), although it also appears that only a relatively few voters registered at the three new sites (T. 847, 851).

(d) *Responsiveness Of The County Commissioners To The Needs Of Blacks*

The district court resolved this issue adversely to defendants (R. 780; Juris. Stat. 77a). A fair statement of the evidence is that the Commissioners approved some of the things desired by blacks, and rejected others. Assuming that this is a valid consideration for judicial consideration (see part 2 of Argument, *supra*), it is submitted that it must have reference to an egregious, wanton disregard of black needs. Otherwise, the Courts are placed in the position of awarding drastic relief based simply on a fine weighing of political fortunes. In any democracy,

no group can expect to get everything it asks for.

In this case, there was testimony as to at least 10 health programs conducted by the county which principally favors blacks (Glisson, T. 961, T2. 26). County Administrator Hopper testified to the number of appointed black officials in the County (T2. 188-197). The Board advertises job openings, but few blacks apply (T2. 184-186). He testified with respect to the county recreation plan which largely benefits blacks (T2. 194) and some eight programs which mainly benefit blacks (T2. 197-210). The district court placed great emphasis on a finding that roads in certain black areas had not been paved, although conceding that this evidence was not presented with "precision or complete clarity" (R. 782; Juris. Stat. 79a). Mr. Hopper testified, however, to a number of roads in black areas which had been paved in the last few years (T2. 208-210), and further pointed out that there are a total of some 640 miles of unpaved roads in the county (T2. 208). He identified some 15 unpaved roads which serve mainly white people (T2. 212-216). Most of the examples relied on by the Court as showing arbitrary road preferences in favor of whites were in fact "political" roads provided by past governors to their supporters, and were not roads dispensed by the Commissioners (T2. 216-217).

(e) *The Enhancing Factors*

The four enhancing factors were divided equally, there being a majority vote requirement and no districting requirement for residency purposes, but the district is not large and there is no single-shot voting provision. In holding that the Burke County election district is large, containing 832 square miles (R. 791, Juris. Stat. 91a), the district court clearly erred, as did the Court of Appeals. 639 F.2d at 1380. The reference to "size" in *Whitcomb v. Chavis*, 403 U.S. 124, 143 (1971), was clearly directed mainly toward the number of *persons* and *positions*, which

cause voter confusion. That is certainly the interpretation placed on this factor in *David v. Garrison*, 553 F.2d 923, 929 (C.A. 5th 1977). Burke County is neither large geographically nor population-wise. It had only 18,255 persons according to the 1970 Census. This is less people than are represented by a single member of the Georgia House of Representatives (25,500) and less than one-fourth the average number of persons represented by a State Senator (81,964). As far as the County's geographic size, it is less than a square with 29 miles on each side. The fact that it is one of the largest counties in Georgia geographically means little when it is considered that Georgia has 159 counties.

(f) *Other Errors In The Court's Findings*

(i) *Segregated Schools*

Much ado was said about segregation in the school system. While the evidence showed that what segregation existed was in small isolated schools under conditions approved by a federal court order (D.E. 55, T2. 86), the fact is that the county commissioners have nothing to do with the school system, which is under the complete control of a separate Board of Education vested with plenary power by the State Constitution, Art. VIII, Sec. V, Par. II (§2-5302), including the authority to levy the local taxes necessary therefor. Art. VIII, Sec. VII, Par. I (§2-5501). Acts of a separate governing body, approved by a federal court, can not be imputed to the Commissioners. *Milliken v. Bradley*, 418 U.S. 717, 748 (1974).

(ii) *Band Uniforms*

The Court below found that the Commissioners donated public money to buy band uniforms for the private school (R. 784, Juris. Stat. p. 82a). To the contrary, the evidence was that the Commissioners *refused* to contribute county money to the *public* high school band because

such funds could not legally be used for such purposes (T2. 84, 150, P.E. 37).

(10) There Was No Proof Of Discriminatory Purpose In The Enactment Or Retention Of The At-Large System

"A discriminatory purpose is not presumed . . . there must be a showing of clear and intentional discrimination," *Snowden v. Hughes*, 321 U.S. 1, 8 (1944), "The invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose," *Washington v. Davis*, 426 U.S. 229, 240 (1976), and in a case of this type, "A plaintiff must prove that the disputed plan was conceived or operated as a purposeful device to further racial discrimination." *Mobile v. Bolden*, 446 U.S. 55, 66 (1980). "[E]ven if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose", and "discriminatory purpose . . . implies more than intent as volition or intent as awareness of consequences. * * * It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of', not merely 'in spite of', its adverse effects upon an identifiable group." *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272, 279 (1979). Even where discriminatory purpose was part of the motivation for governmental action, the defendant may defend by showing that the decision would have been reached anyway for other, valid reasons. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 274 (1977) (f.n. 21).

The district court below found that the at-large system here was not enacted for a discriminatory purpose (R. 776, 791; Juris. Stat. pp. 71a, 90a). There was no cross

appeal by plaintiffs from this finding, and hence it became the law of the case. The sole basis of the decision below was that discriminatory purpose was established in the *retention* of the system (R. 776; Juris. Stat. 71a).

(a) *Retention*

The sole means employed by plaintiffs to prove discriminatory purpose in retention were the *Zimmer* criteria, and they made no effort to adduce any *direct* or *other* evidence showing discriminatory purpose in retention, despite extensive discovery (T. 56, 189, 192, 196, 216, 246, 331, 333, 361, 364), and voluminous evidence, consisting of 761 pages of direct testimony and 289 exhibits. On the other hand, defendants adduced substantial evidence going directly to the point, and showing that there was no discriminatory purpose involved in the retention of the system. This testimony stands unrefuted: Preston Lewis testified that he had served in the House of Representatives from Burke County for 12 years from 1960, and 2 years in the State Senate, longer than any living person, and that district voting had never been an issue, and had never even been suggested until this suit was filed (T2. 137-140, 163). He also testified that he preferred county-wide voting because it avoids the ward system of political deals and trades, and because the county was so small population-wise, it is not difficult for voters to know all the candidates (T. 141). District elections create confusion because voters have difficulty knowing which district they are in. Also, voters register and vote by militia districts, the basis upon which land records are kept (Ga. Code Chap. 23-2) and elect Justices of the Peace by Militia District (Ga. Code, Chap. 24-4); if the county were districted for Commission election purposes, militia districts would have to be crossed with the result that each polling place would have to have 2 ballot boxes and some voters would have to vote at 2 places

(T. 142-4). Other witnesses testified to the same effect. (Harden, T. 101-103; Webster, T2. 32; Thompson, T. 880-2, 911). Mr. Thompson, the Chairman of the Democratic Executive Committee, also stated that districting necessitates redrawing of the district lines after each census (T. 911), thereby generating political controversy every 10 years.

The burden of proof on this issue was on the plaintiffs, *White v. Regester*, 412 U.S. 755 (1973), and they failed to carry it.

(b) *Enactment*

When this case reached the Court of Appeals, plaintiffs changed their position and attempted to argue that the 1911 law was motivated by a discriminatory purpose. The reason was, of course, that this Court's decision in *Mobile* had in the interim destroyed the basis of the district court's opinion. Defendants contend that the district court's finding of no discriminatory purpose in enactment establishes the law of this case on that issue, but will nevertheless address the question briefly here.

Plaintiffs conceded below that there was no discriminatory purpose in the enactment of the law, since a 1908 constitutional amendment adopting a grandfather clause (Ga. Laws 1908, p. 27), had already disfranchised most blacks (R. 154),[8] and hence, as noted in *David v. Garrison*, 553 F.2d 923, 930 (C.A. 5th 1977), there was no need to resort to at-large voting to disadvantage blacks.

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[8] It is very easy in 1981 to look back and condemn this law as a malevolent act of brutal discrimination. The truth is, however, that it was not directed at the Negro but at the widespread vote frauds involving the buying of black votes with whiskey and money, and the wholesale hauling of black voters from county to county. Grantham, Georgia Politics and The Disfranchisement of the Negro, 32 Ga. Hist. Qtly. 1 (1948); Arnett, The Populist Movement In Georgia, 7 Ga. Hist. Qtly. 313, 332 (1923); Coulter, A Short History, p. 393 (1947); Atlanta Constitution, Nov. 8, (1894).

In the Court of Appeals, however, plaintiffs related the history of the 1908 amendment and cited statements made during its adoption in such a misleading way as to suggest that these statements and sentiments prompted passage of the 1911 law creating the Board of Commissioners in Burke County. (Brief, pp. 31-34). This is not the case. No such legislative history exists. Plaintiffs also implied that Burke County citizens ousted the 3 black representatives from the General Assembly during reconstruction, and that one black legislator from Burke County was killed (Brief, p. 31). There is no basis for such inferences. Since all of Burke County's 3 representatives were Negro, there could have been no Burke County whites in the legislature to participate in the ouster, and the black legislator was in fact killed by another black. *Young*, The Negro in Georgia Politics, 1867-1877, Unpublished Thesis, Emory University Library, Atlanta, September 15, 1955, pp. 49-50).

Plaintiffs also argued below that in 1873, Burke County changed its county government from the Ordinary, who was elected county-wide at a time when blacks were voting, to a Board of Commissioners of Roads and Revenues who were appointed by the Grand Jury at a time when blacks did not serve on grand juries. This is not correct. In 1873, blacks were eligible for grand jury service. Code of 1873, §3906. Consequently, no inference can be drawn that the 1873 act was inspired by discriminatory intent. Moreover, *Young* points out that by 1870, Reconstruction had been completed; and the black vote ceased to be a factor in elections. *Young*, Id., p. 106. Moreover, the question here relates to the motivation behind the 1911 law, not the 1873 law. The obvious motivation for the 1911 law was the preference for popular election of officials which was sweeping the United States during the early 1900's.

(11) The Courts Below Erred In Ordering Into Effect A Plan Proposed By Plaintiffs Without Having Found Defendants' Plan To Be Invalid And Having Permitted Defendants To Submit It Under Section 5 Of The Voting Rights Act

The district court rejected defendants' plan not because it was invalid, but because plaintiffs' was "superior" (R. 796; Juris. Stat. 96a).

In a case attacking a districting device as being unconstitutional, the Court should not itself devise a new plan, but should permit the body an opportunity to devise its own plan and submit it under Section 5 of the Voting Rights Act for preclearance. *Wise v. Lipscomb*, 437 U.S. 535 (1978); *Berry v. Doles*, 438 U.S. 190 (1978); *Sanchez v. McDaniel*, 615 F.2d 1023 (C.A. 5th 1980). Indeed, the district court should not even pass upon the validity of the plan itself, but should leave that issue to the preclearance proceedings. *Sanchez v. McDaniel*, supra.

(12) The Judgment Below Should Be Reversed And The Case Remanded With Directions To Enter Judgment For Defendants

Here, unlike *Bolden*, this case was tried after the "intentional discrimination" principle had been held applicable in *Nevett II* (1978) and in a record where this requirement was frequently noted during trial (T. 8, 23; R. 547, 554, 673, 679, 585).

Defendants presented direct evidence showing that the system had not been retained for any discriminatory purpose. Plaintiffs' evidence was based solely upon the *Zimmer* factors, held insufficient in *City of Mobile*, supra. Where as here, the record on appeal is complete, this Court should reverse and remand for entry of judgment on behalf of defendants. *Boyle v. Wells*, 103 F.2d 237(C.A. 6th 1939), cert. den. 308 U.S. 579; *Engleman v. Cahn*, 425

F.2d 954 (C.A. 2nd 1969), cert. den. 397 U.S. 1009; *Levin v. Mississippi River Fuel Corp.*, 386 U.S. 162, 170. Where plaintiffs' evidence is insufficient, reversal and remand for entry of judgment for the defendant is proper. *New York, etc., R. Co., v. Henagan*, 364 U.S. 441 (1960).

CONCLUSION

The judgment below should be reversed with directions to enter judgment on behalf of defendants.

Respectfully submitted,

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